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## Letter Ruling 06-5: Supplement to LR 05-2: Water Desalination Plant

April 20, 2006

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You request a supplement to Letter Ruling 05-02, regarding the plans of \*\*\*\*\* and \*\*\*\*\* (together, the “taxpayers”) to build a water purification plant (the “plant”) and to supply Massachusetts municipalities with water. You request clarification of the statement in Discussion 6 that reads, “[w]ith respect to the process building named in the statement of facts, only those elements of the building that actually are used in the furnishing of water, namely the basins and tanks that are integrated in the structure of the building, are exempt items.” You request that the Department broaden that conclusion, and rule that the entire building, including the walls and the roof, is exempt from the sales and use tax under G.L. c. 64H, § 6(r), (s), the exemptions for materials, tools and fuel [(6)(r)], and machinery and replacement parts [(6)(s)], that are used directly and exclusively in the furnishing of water, when delivered to consumers through mains, lines or pipes. For the reasons discussed in this ruling, the exemptions at G.L. c. 64H, § 6(r), (s) do not extend beyond those elements of the building that are actually used in the furnishing of water, as set forth in LR 05-02. This letter ruling incorporates Letter Ruling 05-02 by reference, including its statement of facts and conclusions of law.

In support of your request, you have relied on *Niagara Mohawk Power Corporation v. Wanamaker*, 144 N.Y.S.2d 458 (1955), a New York case that found that “various structures” physically annexed to exempt machinery were integrated in the production of electricity, and were exempt under the county sales and use tax rules exempting sales for resale and sales for items to be consumed in the manufacture of tangible personal property to be sold. You note in particular, as we did in Letter Ruling 05-02, the fact that *Niagara Mohawk* is cited with approval in the Massachusetts case of *Courier Citizen Company v. Commissioner*, 358 Mass. 563, 572 (1971).

The Court in *Courier Citizen* considered whether materials, machinery and replacement parts met the exemptions of G.L. c. 64H, § 6(r), (s) (before the statute was amended to its current form) as they relate to a manufacturing enterprise, and found that certain printing plates that were used in a stage of production before the actual printing of materials to be sold nevertheless met the terms of the exemption because they were used “directly in production.” *Courier*, 358 Mass. 563, 573 (1971). The court reasoned that even though the items in question did not actually touch the pages that came out of the printing press, they accounted for a necessary physical step in the printing process.<sup>[1]</sup>

The *Courier Citizen* case does not provide guidance on the matter you have presented, namely whether a structure that houses items that are used in the furnishing of water are exempt. While set forth in a single section of the statute, the exemptions that apply to manufacturing are not subject to analysis identical with that for the exemptions that apply to the furnishing of water. G.L. c. 64H, § 6(r), (s). The limits to the exemption for the furnishing of water are found primarily in the “consumed

and used directly and exclusively” language. We believe the processing building itself, particularly the walls and the roof, are not within these exemptions. The building is not directly used in the process that leads to the water being piped to customers; the basins and tanks, by contrast, are physically part of the desalination process. *Courier Citizen* also provides no guidance on the meaning of the term “exclusively” in the statute, because the exclusivity requirement was added after *Courier Citizen* was decided. (See fn.1) The building is not exclusively part of the furnishing process; like any building that houses exempt machinery, it is a place where workers can, and do, perform other activities besides the purification and distribution of water.

Note also that the G.L. c. 64H, § 6(r) exemption for materials, tools, and fuel will not apply to the process building, because that exemption only extends to items that are consumed and used in the furnishing or water, that is, that have a normal useful life of less than one year, or whose costs are allowable as an ordinary and necessary business expense for federal income tax purposes.

We thus affirm our original conclusion in LR 05-02; only those elements of the building, such as the basins and tanks in your statement of facts, that are used directly and exclusively in the furnishing of water, are exempt.

Very truly yours,

/s/Alan LeBovidge

Alan LeBovidge  
Commissioner of Revenue

AL:MTF:dt

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[1] After *Courier Citizen*, G.L. c. 64H, § 6(s) was revised to allow the machinery exemption in the manufacturing context only where the machinery effects a “direct and immediate physical change upon the tangible personal property to be sold.” St. 1971, c. 555, § 45. That amendment also added the “and exclusively” requirement to both the 6(r) and (s) exemptions, among other changes. In light of these amendments, *Courier Citizen* is of minimal value as precedent with respect to the exemption for machinery. Cf. *Commissioner of Revenue v. V.H. Blackinton & Co.*, 420 Mass. 259 (1995)(limiting the effect of the analysis in *Courier Citizen*, citing the amended statute as the basis for its holding).